ABD RAUF ALIP

v.

SURUHANJAYA PASUKAN POLIS & ANOR

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: W-01-289-1996]
8 NOVEMBER 2002

ADMINISTRATIVE LAW: *Public servants - Termination of service - Termination simpliciter - Distinction between termination and dismissal - Distinction between probationer and permanent employee - Contractual rights and liabilities of probationers - Assistant superintendent of police*

POLICE: *Contract of employment - Termination of service - Termination simpliciter - Distinction between termination and dismissal - Distinction between probationer and permanent employee - Contractual rights and liabilities of probationers - Assistant superintendent of police*

The plaintiff was engaged as a probationer with the rank of a cadet assistant superintendent of police pursuant to a contract of employment, dated 8 December 1984, which provided, *inter alia*, that the plaintiff's services during the probationary period could be terminated by the defendants upon one month's notice. On 9 February 1989, the plaintiff was served with a show-cause letter requesting him to make representations as to why his services should not be terminated. The plaintiff made his representations on 1 March 1989 and his services were terminated on 16 November 1989. The thrust of the plaintiff's complaint was that the letter of termination referred to a letter of representation dated 13 April 1989 purportedly written by him, which he never did write. It was, therefore, argued that he had been denied natural justice because the termination of his services was based on a non-existent letter of representation. The defendants' short reply was that there was no 'dismissal' involved here but only a 'termination simpliciter'. The High Court accepted the defendants' version and hence the plaintiff's instant appeal.

Held:
Per Gopal Sri Ram JCA

[1] Under English law, a servant may be summarily dismissed for disobedience to orders or misconduct, or may have his employment terminated by notice or the payment of wages *in lieu* of notice. Under

the laws of Malaysia, a similar distinction between dismissal and termination of services appears to exist, and there is nothing in the Federal Constitution which affects the right of the government to terminate temporary employment in accordance with the terms of the engagement. (*Government of Malaysia v. Lionel* [1974] 1 MLJ 3 PC followed.) The law has always recognised a distinction between a probationer and a permanent employee, be it in the public or private sector. (p 4 f-h)

[Plaintiff's appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif telah diambil bekerja sebagai pelatih dengan pangkat kadet penolong penguasa polis selaras dengan satu kontrak pekerjaan, bertarikh 8 Disember 1984, yang mana memperuntukan, antara lainnya, bahawa perkhidmatan plaintif ketika dalam tempoh latihan boleh ditamatkan oleh defendan setelah notis satu bulan diberikan. Pada 9 Februari 1989, plaintif telah disampaikan dengan sepucuk surat menunjukkan sebab yang meminta beliau membuat representasi-representasi berhubung dengan mengapa perkhidmatan beliau tidak seharusnya ditamatkan. Plaintif telah membuat representasi-representasi beliau pada 1 Mac 1989 dan perkhidmatan beliau telah ditamatkan pada 16 November 1989. Intipati aduan plaintif adalah bahawa surat penamatan tersebut merujuk kepada surat representasi bertarikh 13 April 1989 yang dikatakan telah ditulis oleh beliau, yang mana tidak pernah beliau tulis. Ianya adalah dengan itu, dihujahkan bahawa beliau telah dinafikan keadilan asasi kerana penamatan perkhidmatan beliau adalah diasaskan pada surat representasi yang tidak wujud. Jawapan ringkas defendan-defendan adalah bahawa 'dismissal' tidak terlibat di sini tetapi hanya suatu 'termination simpliciter'. Mahkamah Tinggi telah menerima versi defendan-defendan dan oleh itu menyebabkan rayuan semasa plaintif.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Di bawah Undang-Undang Inggeris, seseorang pengkhidmat boleh dipecat kerana ingkar mematuhi perintah-perintah atau salah-laku, atau mungkin akan ditamatkan perkhidmatannya melalui notis atau pembayaran gaji bagi menggantikan notis. Di bawah undang-undang Malaysia, perbezaan yang sama antara pemecatan dan penamatan perkhidmatan nampaknya wujud, dan tidak terdapat apa-apa di dalam Perlembagaan Persekutuan yang menjejaskan hak kerajaan untuk menamatkan pekerjaan sementara menurut terma-terma pekerjaan tersebut. (*Government of Malaysia v. Lionel* [1974]

1 MLJ 3 PC diikuti.) Undang-undang selalu mengiktirafkan satu perbezaan antara pelatih dan seorang pekerja tetap, sama ada ianya dalam perkhidmatan awam atau sektor swasta.

Rayuan plaintif ditolak.]

Case(s) referred to:
Government of Malaysia v. Lionel [1974] 1 MLJ 3 (PC) ***(foll)***

Legislation referred to:
Federal Constitution, arts. 135(2)

For the plaintiff - Karpal Singh (Jagdeep Singh Deo); M/s Karpal Singh & Co
For the defendants - Dato' Mary Lim Thiam Suan SFC (Aliza Jamaluddin & Anita Mary Fernandez FC)

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S7-21-219-1990]

Reported by Gan Peng Chiang

JUDGMENT
(Oral)

Gopal Sri Ram JCA delivering judgmentof the court:
This is the judgment of the court.

By a contract dated 8 December 1984 the appellant was engaged as a probationer with the rank of a cadet Assistant Superintendent of Police. One of the terms of his contract was that he would be confirmed in this service provided that he obtained a letter of recommendation from his Head of Department.

On 9 February 1989 the appellant was served with a letter asking him to show cause why his services should not be terminated and calling upon him to make representations in answer. By a letter dated 1 March 1989 the appellant made his representations. By a letter dated 16 November 1989 the appellant's services were terminated and he was paid one month's salary *in lieu* of notice.

We pause here to mention that the appellant's contract of employment provides in cl. 3(iv) for the termination of service during the probationary period by either one month's notice or one month's salary in lieu of notice.

The letter of termination refers to a letter of representation from the appellant dated 13 April 1989. The appellant's case is that there was in fact no such letter. Accordingly he had been denied natural justice in that his termination was based on a non-existent letter. This is the identical argument advanced by the appellant in the court below.

At the trial of the appellant's action for reinstatement, the defendants elected not to call evidence. Their argument was that there was here no dismissal at all but only one of termination simpliciter. The learned judge accepted that argument and dismissed the appellant's claim.

In our view the present appeal is already covered by high authority which is binding upon us. It is the decision of the Privy Council in *Government of Malaysia v. Lionel* [1974] 1 MLJ 3 (PC). That was a case involving a temporary officer who was on contract to serve the second respondent in that appeal. He had been served with a letter to show cause not dissimilar from that issued to the appellant in the present instance. Lionel argued that he had been wrongfully dismissed contrary to art. 135(2) of the Federal Constitution which requires a reasonable opportunity to be given to a civil servant before his dismissal. At first instance Syed Othman J, a judge for whose decisions this court has much respect, held that Lionel was not dismissed at all and that his was a case of termination *simpliciter* in accordance with the terms and conditions of his contract of service. Lionel then appealed to the Federal Court which held that there had been a breach of art. 135(2) and that the provisions of the Constitution could not be contracted out of – see [1971] 2 MLJ 172 (FC) p. 173. Accordingly the Federal Court reversed Syed Othman J. The Government of Malaysia then appealed to the Privy Council which reversed the Federal Court and restored the judgment at first instance.

The advice of the Board on that occasion was delivered by Viscount Dilhorne who said at p. 5:

> Under English law a servant may be summarily dismissed for disobedience to orders or misconduct or may have his employment terminated by notice or the payment of wages in lieu of notice. **Under the laws of Malaysia a similar distinction between dismissal and termination of services appears to exist** and in their Lordships' opinion there is nothing in the Constitution which affects the right of the Government to terminate temporary employment in accordance with the terms of the engagement. Their Lordships do not agree with Ong CJ that Regulation 36 is to be regarded as invalid as inconsistent with the Constitution. (emphasis added.)

We are bound by this statement of principle. It applies squarely to the facts of the present appeal. If Lionel could not succeed, we can hardly see how the present appellant can.

We could only make this further observation. This is a case of a probationer. And the law has always recognised a distinction between a probationer and a permanent employee, be it in the public or private sector.

For the reasons already given, we agree with the judgment of the learned trial judge in the present case. The appeal is devoid of merit. It is dismissed. The deposit in court shall be paid to the respondents who shall have the costs of this appeal as taxed by a proper officer of this court.

Before we conclude we would record our appreciation to both Mr. Karpal Singh and Dato' Mary Lim for their clear and cogent submissions before us this morning. Without their effort this *ex tempore* judgment would not have been possible.

Delivered in Open Court at the conclusion of arguments on 14 June 2002.